

Message Text

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FM SECSTATE WASHDC

TO AMEMBASSY SANTIAGO IMMEDIATE

S E C R E T STATE 179347

EXDIS

E.O. 11652: XGDS

TAGS: PFOR, EIND, CI

SUBJECT: CHILE BILATERAL TALKS

FOR THE AMBASSADOR

1. BEFORE "RECESSING" AUGUST 16-17 ROUND OF BILATERAL TALKS, U.S. SIDE OFFERED TO SUBMIT QUESTIONS CONCERNING LATEST CHILEAN OFFER AND OTHER OUTSTANDING ISSUES SO AS TO PERMIT CHILEAN SIDE OPPORTUNITY FOR STUDY BEFORE TALKS ARE RESUMED. YOU ARE REQUESTED, USING YOUR DISCRETION AS TO EXACT TIMING, TO SUBMIT IN WRITING TO TOHA QUESTIONS WHICH FOLLOW AT END OF THIS CABLE. THIS WILL ALSO PROVIDE YOU WITH OPPORTUNITY TO SOUND OUT CHILEAN REACTION TO LAST TALKS AND PROSPECTS FOR NEXT ROUND.

2. AS YOU KNOW, DATE AND SITE OF NEXT ROUND WERE LEFT OPEN. REGARDING THE SITE, WE ARE TAKING AT FACE VALUE ORLANDINI'S AUGUST 21 PUBLIC STATEMENT THAT "ANOTHER MEETING WILL BE HELD NEXT MONTH, ALSO IN WASHINGTON" (CHILEAN SECRET

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EMBASSY HERE HAS INDICATED WASHINGTON WILL BE THE SITE).

WE ARE STILL UNDETERMINED ABOUT TIMING AND ASSUME INTERNAL EVENTS WILL AFFECT CHILEAN DECISION. YOU MAY REITERATE ASSISTANT SECRETARY KUBISCH'S OFFER TO MEET AGAIN SOON, LEAVING IT TO CHILEAN SIDE TO SUGGEST SPECIFIC DATE ONCE THEY HAVE STUDIED OUR QUESTIONS.

3. QUESTIONS FOR THE CHILEAN DELEGATION RELATING TO ITS SUGGESTIONS OF AUGUST 16-17: QUOTE

(1) THE U.S. DELEGATION ASKS THE GOC TO RECONSIDER THE U.S. PROPOSAL FOR AN EFFECTIVE, BINDING THIRD-PARTY PROCEEDING, TAKING INTO ACCOUNT:

(A) THE HISTORIC TRADITION IN CHILE THAT INTERNATIONAL LAW FORMS A PART OF THE NATIONAL JURISPRUDENCE.
THE NATIONAL JURISPRUDENCE;

(B) THE BINDING OBLIGATION TO ARBITRATE THIS DISPUTE UNDER THE 1929 GENERAL TREATY OF INTER-AMERICAN ARBITRATION;

(C) THE FURTHER AUTHORITY OF THE GOC TO NEGOTIATE AND ARBITRATE UNDER THE 1914 BILATERAL TREATY AND THE 1899 HAGUE CONVENTION;

(D) THE PROPRIETY UNDER INTERNATIONAL LAW OF REMEDYING A DENIAL OF JUSTICE OR OTHER BREACH OF STATE RESPONSIBILITY BY PAYMENT OF DAMAGES, WHICH IN THIS CASE COULD CORRESPOND TO COMPENSATION. PAYMENT TO MEET STATE RESPONSIBILITY WOULD NOT APPEAR TO COME WITHIN OR TO CONTRAVENE THE CONSTITUTIONAL AMENDMENT OF JULY 1971 WHICH DEALS WITH COMPENSATION PER SE NOT OBLIGATIONS OWED TO ANOTHER STATE UNDER INTERNATIONAL LAW.

(2) IF A THIRD-PARTY MECHANISM COULD BE ACCEPTED IN PRINCIPLE, GOC ANSWERS TO THE FOLLOWING QUESTIONS WOULD BE HELPFUL IN DEVELOPING A PROCEDURE THAT MIGHT NARROW DIFFERENCES:

(A) WOULD THE PROCEEDING BE CONFINED TO THE COPPER
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COMPENSATION PROBLEM WITH OTHER QUESTIONS BEING RESOLVED ON A BILATERAL BASIS?

(B) COULD THE GOC AGREE THAT THE THIRD PARTY BE AUTHORIZED TO MAKE A JUDGMENT ON ALL PERTINENT QUESTIONS OF INTERNATIONAL LAW INCLUDING, FOR EXAMPLE, THE LEGALITY OF THE EXCESS PROFITS DEDUCTION, SO THAT IT CAN DETERMINE THE AMOUNT OF COMPENSATION DUE EACH COMPANY? THE GOC NOTES THE

IMPACT AN INTERNATIONAL JUDGMENT ON DENIAL OF JUSTICE WOULD HAVE IN CHILE AND HOW THAT WOULD FACILITATE A SOLUTION. BY THE SAME LOGIC, WOULD NOT AN INTERNATIONAL JUDGMENT ON EXCESS PROFITS, OR ESPECIALLY ON COMPENSATION, GREATLY FACILITATE MATTERS IN CHILE?

(C) WOULD THE GOC AGREE THAT THE JUDGMENT OF THE

THIRD PARTY BE DEFINITIVE ON MATTERS OF INTERNATIONAL LAW EVEN IF NOT BINDING IN THE SENSE OF CREATING A NEW, INDEPENDENT INTERNATIONAL OBLIGATION?

(D) WOULD THE GOC AGREE TO MAKE EVERY EFFORT TO IMPLEMENT THE CONCLUSIONS OF THE THIRD PARTY, ALTHOUGH THE CHILEAN CONGRESS TECHNICALLY MIGHT NOT BE BOUND BY THE DECISION?

(E) WOULD THE GOC UNDERTAKE NOT TO CHALLENGE THE CONCLUSIONS OF THE THIRD PARTY BEFORE THE CHILEAN PUBLIC AND BEFORE ANY JUDICIAL FORUM IN WHICH THE ISSUE MIGHT ARISE?

(F) WOULD THE GOC AGREE TO WAIVE SOVEREIGN IMMUNITY AND OTHER DEFENSES IN LAW SUITS IN THE EVENT A THIRD PARTY ESTABLISHED AN OBLIGATION TO PAY COMPENSATION?

(G) WOULD THE GOC AGREE THAT THE AGREEMENT ESTABLISHING THE PROCEEDING STIPULATE CERTAIN BASIC RULES TYPICALLY APPLICABLE TO SUCH PROCEEDING, SUCH AS THOSE STATED IN ARTICLES 9, 12, 19, 20, 30 AND 32 OF THE INTERNATIONAL LAW COMMISSION'S 1958 MODEL RULES ON ARBITRAL PROCEDURE?

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(3) IN ORDER TO CLARIFY THE U.S. UNDERSTANDING OF THE GOC "SUGGESTIONS", WITHOUT IN ANY WAY ACCEPTING THEM AS A BASIS FOR DISCUSSION, THE FOLLOWING QUESTIONS ARE POSED:

(A) WHAT ASSURANCE CAN THE GOC GIVE THAT THE COPPER TRIBUNAL WOULD REOPEN THE CASE, IN VIEW OF ITS PRIOR DECISION?

(B) WOULD THE COPPER TRIBUNAL BE ABLE TO ACCEPT THE JUDGMENT OF THE INTERNATIONAL COMMISSION ON DENIAL OF JUSTICE, THE LEGALITY OF EXCESS PROFITS DEDUCTIONS AND THE AMOUNT OF COMPENSATION DUE AS THE BASIS OF ITS CALCULATIONS? COULD THE GOC MAKE FIRM COMMITMENTS IN THIS

REGARD?

(C) THE GOC SUGGESTS THAT PRESIDENT ALLENDE WILL BE ABLE TO IMPLEMENT THE DECISION OF THE COPPER TRIBUNAL ON HIS OWN AUTHORITY WITHOUT REFERENCE TO THE CHILEAN CONGRESS. IS NOT CONGRESSIONAL ACTION NECESSARY TO APPROPRIATE FUNDS FOR PAYMENT TO THE COMPANIES? FROM WHAT APPROPRIATIONS WOULD PAYMENT BE MADE?

(D) COULD THE GOC AGREE TO THE PROVISIONS OUT-LINED IN QUESTION 2 ABOVE WITH RESPECT TO ITS "SUGGESTION" ON USE OF THE INTERNATIONAL COMMISSION?

(4) WOULD THE GOC EXPLAIN ITS SUGGESTIONS WITH RESPECT TO POSSIBLE PAYMENT OF THE CODELCO-ANACONDA NOTES? END QUOTE. RUSH

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